Supreme U.S.
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No. 95-506

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

VERMONT INFORMATION PROCESSING INCORPORATED,
Petitioner,

v.

COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,
Respondent.

Petition for a Writ of Certiorari to the New York Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state has jurisdiction over mail order sales of an out-of-state company based on the seller's sporadic non-taxable activity in the state where that activity does not constitute a substantial physical presence.

PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rule 29.1, petitioner Vermont Information Processing, Inc. reports that it has no subsidiaries or affiliates.

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Petition for a Writ of Certiorari to the New York Court of Appeals

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PETITION FOR A WRIT OF CERTIORARI

Vermont Information Processing, Inc. ("Petitioner") respectfully petitions for a writ of certiorari to review the judgment of the New York Court of Appeals in this case.

OPINIONS BELOW

The opinion of the New York Court of Appeals is not yet reported, and may be found at 1995 N.Y. LEXIS 1140 (June 14, 1995). It is reprinted at pages 1a-24a of the appendix to this petition. The opinion of the Appellate Division of the New York Supreme Court is reported at 615 N.Y.S.2d 99 (App. Div. 1994). It is reprinted at pages 25a-28a of the appendix to this petition. The opinion of the State of New York Tax Appeals Tribunal, DTA No. 806207 (Jan. 21, 1993), is unreported. It is reprinted at pages 29a-47a of the appendix to this petition. The opinion of the State of New York Division of Tax Appeals, DTA No. 806207 (Feb. 27, 1992), also is unreported. It is reprinted at pages 48a-67a of the appendix to this petition.

JURISDICTION

The Court of Appeals entered its judgment on June 14, 1995. On August 23, 1995, on application of Petitioner, Justice Ginsburg extended the time in which to file the petition for writ of certiorari to and including September 26, 1995. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Article I, § 8 of the United States Constitution provides in pertinent part as follows:

> The Congress shall have Power . . . To Regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .

STATEMENT

This case presents the question whether an out-of-state mail order company, whose only contacts with the taxing state (other than mail, telephone and common carrier) are through sporadic visits of employees for non-taxable purposes, has sufficient physical presence to permit that state to impose a use tax collection obligation.

Vermont Information Processing, Inc. ("VIP"), based in Colchester, Vermont, designs and sells computer software to beverage distributors nationwide. App. 2a. During the tax period in question, software was not considered tangible personal property by New York and therefore was not subject to sales or use tax. App. 49a-50a. Incidental to its sales of software, VIP also sold hardware, *i.e.*, computers, to its beverage distributor customers. App. 51a. Computers are considered tangible personal property in New York and therefore may be subject to sales or use tax. App. 50a. As the courts below found, VIP employees visited New York customers, on average, approximately a dozen times per year "to resolve problems and give additional instructions in connection with the use of VIP software programs, and occasionally for installing software." App. 2a, 27a. These visits, for which VIP customers were

charged, were invoiced separately from the sales and were not subject to tax.[1] App. 36a. The State here claims the right to tax the hardware sales, because of the handful of non-taxable visits each year to the State. The court below agreed.

Petitioner urges that the decision below is directly contrary to this Court's decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), and other decisions of this Court.

1. Vermont Information Processing, Inc.'s Business

VIP was not licensed to do business in New York State. App. 37a. It did not maintain a place of business in New York nor did it have any offices in the State. App. 27a. VIP had no employees in the State, and it did not employ salespersons to travel into New York to solicit sales there. App. 32a. Nor did VIP engage in solicitation of any kind by means of personal visits by VIP employees, agents or representatives. App. 27a.

VIP's business, for the most part, resulted from "word-of-mouth" promotion by satisfied VIP customers. App. 32a. Beverage companies who had heard of VIP's software from other beverage dealers contacted VIP to learn more about its product. *Id.* VIP representatives in Vermont then spoke to potential customers over the telephone and mailed them brochures describing VIP's software and services. *Id.*

If a beverage distributor decided to purchase VIP's software, the distributor was sent a contract by United Parcel Service ("UPS"). *Id.* After the executed contract was returned, VIP

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[1] Although the Court of Appeals noted that VIP had agreed to provide a charge-free visit to its customers "if problems necessitating the visit occurred within the first 60 days of installation," App. 15a, there is no evidence in the record that any such visits ever occurred. Significantly, the uncontroverted testimony of Howard Aiken, VIP's President, was that "[w]e charge [the customers] quite a bit to go see them." *In the Matter of the Petition of Vermont Information Processing, Inc., State of New York, Dep't of Taxation and Finance, Division of Tax Appeals*, Transcript of Hearing at 183 (June 10, 1991).

would send the beverage distributor a package containing forms to be filled out regarding the distributor's operations, including a list of its customers and products, and record-keeping systems. *Id.* The beverage distributor would then return the completed forms to VIP by UPS. From this information, VIP developed software for the distributor's beverage business. *Id.*

After VIP developed the software program, the program (contained on a computer diskette) was shipped to the customer via common carrier, and the beverage distributor would come to Vermont for training in the use of the software. App. 33a. As part of the services provided to its customers, VIP personnel were available to VIP customers by telephone to answer questions and resolve any problems that customers might be having with the software program. App. 34a. In addition, VIP "installers" — who actually were software programmers — were able to provide assistance by directly accessing the customer's computer over the telephone through the use of a modem. *Id.* A customer's program thus could be modified or corrected from Vermont, regardless of the location of the customer's business. *Id.*

For beverage distributors who wanted to use VIP's software but did not have a computer, VIP could sell computer hardware to them under "industry marketer" agreements with computer manufacturers, *i.e.*, VIP was authorized by three computer manufacturers to sell their computers solely to beverage dealers. App. 32a-33a. If a VIP software transaction included the purchase of computer hardware, the computer was shipped from the manufacturer to VIP, where VIP loaded its software onto the computer. App. 33a. VIP then shipped the computer via common carrier. Although VIP billed customers for the computers and for the installation and initial maintenance of the hardware, App. 33a-34a, the computer manufacturer — and not VIP — installed the computer at the customer's work site and performed all hardware maintenance and service. App. 34a. There is no claim in this case, nor could there be, that these activities subjected the hardware sales to taxation under the Commerce Clause.

Although VIP's policy was to discourage travel to customers' work sites as much as possible, where necessary to install or maintain software or otherwise assist the customer with the software, VIP employees would travel to its customers. App. 35a-36a. The travel and labor costs for these visits were invoiced separately from the sale of the software itself. App. 36a. It was estimated that five percent of its customer accounts required some travel, App. 27a, amounting to approximately, on average, a dozen visits per year to New York, *id.*, and that these trips were for the purpose of correcting persistent or difficult problems, or occasionally to install software or train employees. *Id.* The State claimed that these sporadic visits subjected all of VIP's hardware sales to New York customers to New York State taxation.

2. The Decisions Below

In November, 1987, the New York Department of Taxation and Finance issued to VIP a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period December 1, 1983 through November 30, 1986. VIP filed a petition for revision of that Determination or for refund of sales and use taxes, and a hearing was held before an administrative law judge in the Division of Tax Appeals. VIP claimed, *inter alia*, that imposition of the tax collection obligation violated the Commerce Clause. App. 48a-49a, 61a. The ALJ concluded that VIP was liable for the tax. App. 65a.

On appeal, the Tax Tribunal concluded that VIP is a "vendor" within the meaning of the New York tax law, based on its incidental sales of computer hardware. App. 41a. The Tribunal then looked to whether VIP had sufficient nexus to permit New York, under the Commerce Clause, to impose an obligation on VIP to collect the State use tax for those computer sales. App. 43a-44a. To the Tax Tribunal, there was sufficient nexus because VIP "employees periodically entered New York to install or to provide maintenance for the customized computer software it sold." App. 46a. VIP invoices indicated, over a three-year period, 41 "items of travel expense or charges for site visits" in

New York for the period December 1, 1983 through November 30, 1986, which were for approximately a dozen visits to New York each year. App. 27a, 36a-37a.

Although the Tax Tribunal found that "[t]here is no correlation between the hardware installation charges and the travel or site visit charges," App. 37a, it rejected VIP's claim that, because its limited presence in New York related solely to software, for which no use tax was due, the activities of those employees should not be taken into account in determining whether sufficient nexus existed. To the Tax Tribunal, "all of [VIP's] activities in New York may properly be considered in determining whether [VIP] had a sufficient connection with New York to warrant imposition of the burden to collect the use tax." App. 46a.

The Tax Tribunal concluded that VIP's activities in New York satisfied the requirement of "substantial nexus" based on VIP's physical presence in New York. App. 47a. Although noting that the Supreme Court has not "quantified the extent of the physical presence needed," it determined that VIP's activities — those related to non-taxable software — represented more than a "slight physical presence" in New York, thereby rendering constitutional New York's use tax collection obligation. App. 46a-47a.

On appeal, the Appellate Division of the New York Supreme Court unanimously annulled the determination of the Tax Tribunal. To the Appellate Division, although the "Supreme Court did not indicate in *Quill Corp. v. North Dakota* [, 504 U.S. 298 (1992),] exactly how much contact with a state is enough to satisfy the constitutional mandate, it is clear that more than a 'slight' presence is necessary." App. 26a-27a. The court noted that VIP "has no office or other place of business, no telephone number, no employees or salespeople, and no means of delivering its products in New York . . . ." App. 27a. On-site visits are made only to approximately 5% of VIP's customers "for the purpose of correcting persistent or difficult problems, or occasionally to install software or train employees." *Id.* Although some of the invoices referenced "hardware," VIP "does not actually perform any of the hardware installation and

maintenance listed on its invoices . . . ." *Id.* To the Appellate Division, "[t]his activity, without more, does not rise to the level necessary to justify taxation." *Id.*

The New York Court of Appeals consolidated VIP's appeal with *Orvis Co. v. Tax Appeals Tribunal*, 612 N.Y.S.2d 503, (App. Div. 1994), and, with two judges dissenting, reversed the Appellate Division's holding with respect to VIP. The court first noted that in *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), the Supreme Court "for the first time explicitly made some physical presence of the vendor in the taxing State" a requirement under the Commerce Clause for charging the vendor with the duty of collecting a use tax on mail order purchases by residents of that state. App. 4a-5a. This was a "minimum connection requirement." App. 10a. In *Quill*, according to the court, the Supreme Court "begrudging[ly]" retained the *Bellas Hess* "physical presence" requirement, *id.*, a "course [that] was not adopted without some apparent reluctance." App. 8a.

According to the New York court, the reasons for the physical presence requirement in *Quill* were different from those in *National Bellas Hess*. App. 8a-9a. *National Bellas Hess* required a physical presence on the ground that it was the only basis on which an out-of-state "vendor justifiably [can] be called upon to pay its fair share of the cost of local government." App. 9a. In contrast, in *Quill*, "the *quid pro quo* for State taxation could be found in the benefits and protections the State confers in providing for a stable and secure legal economic environment for a mail-order vendor's substantial marketing efforts aimed at the taxing State." *Id.* Thus, according to the New York court, the physical presence requirement in *Quill* was based on two other grounds: first, it furnished a "bright-line test," marking the "discrete realm of commercial activity that is free from interstate taxation," and second, it satisfied the "demands of stare decisis." *Id.* Given these shifts in rationale, the New York court concluded that "[t]he true holding of *Quill*," App. 3a, "cannot be substantively construed as other than a somewhat begrudging

retention of the *Bellas Hess* physical presence requirement . . . ." App. 10a.

Accordingly, the New York court concluded that "[w]hile a physical presence of the vendor is required, it need not be substantial. Rather, it must be demonstrably more than a 'slightest presence.' And it may be manifested by the presence in the taxing State of the vendor's property or the conduct of economic activities in the taxing State performed by the vendor's personnel or on its behalf." App. 12a (internal citation omitted).

Applying that standard to VIP, the court determined that the tax assessment against VIP was proper. There were charges for 41 trips to New York over a three-year period by VIP employees. App. 15a.[2] To the court, "VIP's trouble-shooting visits to New York vendees," together with VIP's "assurances to prospective customers that it would make such visits," had the effect of "enhanc[ing] sales and significantly contribut[ing] to VIP's ability to establish and maintain a market for the computer hardware and software it sold in New York." *Id.* Accordingly, VIP's activities

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[2] Although the court of appeals referenced computer hardware in describing VIP employee trips to New York customers, App. 15a, the record demonstrates that the trips to New York concerned only software. The Tax Tribunal noted that, separate from the 41 invoices over a three-year period for "travel expense or charges for site visits," there were 40 invoices "show[ing] charges for items related to installation and maintenance of computer hardware and software." App. 36a-37a. The Tax Tribunal specifically found that "[t]here is no correlation between the hardware installation charges and the travel or site visit charges . . . . The invoices do not undermine the credibility of [VIP's President's] testimony that VIP did not travel to New York to install, service or maintain computer hardware." App. 37a. In fact, "[a]ny computer hardware sold by VIP was installed, serviced and maintained at the customer's business location by employees of the hardware manufacturer." App. 34a.

in New York "were, thus, definite and of greater significance than merely a slightest presence." *Id.* (citation omitted).[3]

In dissent, Judge Bellacosa, joined by Judge Ciparick, stated that the majority opinion is "telling out-of-state business that they dare not dip their toes within New York's borders without incurring New York taxes . . . ." App. 16a. But, the dissent claimed, the majority "miscasts the evolution of United States Supreme Court Commerce Clause precedents and injects confusion when a 'substantial nexus' bright line has been the guiding hallmark and jurisprudential goal . . . ." *Id.* Under the majority's decision, "sporadic sojourns into a state" would satisfy the Commerce Clause requirement of substantial nexus, App. 18a, but *Quill* made clear that such "minimum contacts" do not constitute a "substantial nexus" sufficient to satisfy the Commerce Clause. App. 17a, 18a. "[A]bsent evidence of a 'small sales force, plant, or office' (*Quill Corp. v. North Dakota*, 504 U.S. 298, 315) or '*continuous* local solicitation' (*Scripto, Inc. v.*

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[3] The case consolidated with VIP, *Orvis Co. v. Tax Appeals Tribunal*, 612 N.Y.S.2d 503 (App. Div. 1994), involved Orvis, a catalogue mail order house located in Manchester, Vermont. Like VIP, Orvis maintained no offices or stores in New York and had no salespeople residing in New York. All sales were subject to approval in Vermont. On twelve occasions over the three-year period in question, Orvis salespeople traveled to New York to call on stores not owned by Orvis. App. 2a. The Appellate Division held that Orvis lacked the requisite "substantial nexus," noting that in *Quill v. North Dakota*, the Supreme Court had increased the requisite threshold from the "slightest presence" to "substantial amounts of in-state people or property." 612 N.Y.S.2d at 505.

To the Appellate Division, these "sporadic activities in New York do not satisfy the 'substantial nexus' requirement articulated in *Quill* . . . ." *Id.* at 506. On appeal, the New York Court of Appeals rejected Orvis' claims, but remanded that case to consider "additional arguments raised by Orvis to the Appellate Division, and not considered by that Court . . . ." App. 14a. *Orvis Co. v. Tax Appeals Tribunal* is presently pending on remand before the Appellate Division.

Carson, 362 U.S. 207, 211 (1960) [emphasis added]), within New York State, imposition of the taxes at issue should be unconstitutional." App. 16a.

This petition for writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

For many years, the efforts of state taxing authorities to ignore Commerce Clause limitations on the mail order industry has required the attention of this Court.[4] This case presents another instance where review in this area is essential to correct the manifest error of the court below.

Despite the decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), in this case and others, states are now claiming that economic presence and some minimal physical presence should satisfy the Commerce Clause. These arguments directly conflict with *Quill* and other decisions of this Court. This issue merits this Court's attention.

I. THE DECISION IN THIS CASE CONFLICTS WITH DECISIONS OF THIS COURT

The Commerce Clause, as this Court has recognized, addresses concerns about "the effects of State regulation on the national economy," and is designed to avoid the imposition of "state regulations that unduly burden interstate commerce." *Quill*, 504 U.S. at 312-13. To avoid these burdens, this Court repeatedly has held that a tax can only be "applied to an activity with a substantial nexus with the taxing State." *Complete Auto Transit v. Brady*, 430 U.S. 274, 279 (1977); *see Quill*, 504 U.S. at 312-15; *Tyler Pipe Industries, Inc. v. Washington State Dep't of*

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[4] Early cases in the state tax area relied on a fairly interchangeable standard under the Commerce Clause and the Due Process Clause. *See Quill*, 504 U.S. at 312. In *Quill*, this Court made clear that the Commerce Clause imposes more stringent limitations than the Due Process Clause. *Id.* at 313.

Revenue, 483 U.S. 232 (1987). The decision below does not satisfy this requirement.

A. This Court Consistently Has Held That A Use Tax Collection Obligation Requires A Substantial In-State Physical Presence Of The Out-of-State Vendor

Where mail order sales are concerned, this Court consistently has permitted states to impose use tax collection obligations only on those out-of-state vendors with a substantial physical presence in the taxing state. *See, e.g., Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U.S. 62 (1939) (upholding imposition of sales tax where out-of-state vendor had salespersons in the taxing state); *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941) (upholding imposition of sales tax where out-of-state vendor had retail stores in the taxing state). The "farthest constitutional reach" of a state's power to impose a tax on an out-of-state vendor, *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 754, 757 (1967), is represented by this Court's decision in *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960). There, this Court held that a use tax collection obligation could be imposed on an out-of-state vendor with "10 wholesalers, jobbers, or 'salesmen' conducting continuous local solicitation" in the taxing state. *Id.* at 211.

Where, however, the out-of-state vendor's physical presence in the state is sporadic and insubstantial, this Court has held that, consistent with the Constitution, use tax cannot be imposed. For example, *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954), rejected the imposition of a use tax where the out-of-state vendor was present in the state on an occasional basis to make deliveries with its own truck. Indeed, in *National Geographic Society v. California Board of Equalization*, 430 U.S. 551 (1977), this Court expressly rejected the notion that the "slightest presence" of a mail order seller in the state would satisfy the physical presence rule. *Id.* at 555-56.

This line of cases culminated in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 754 (1967). The Court noted that it had "never held that a State may impose the duty of use tax

collection and payment upon a seller whose only connection with customers in the State is by common carrier or the United States mail." *Id.* at 758. Such vendors are sharply distinct from those with "retail outlets, solicitors, or property" within the taxing state. *Id.* Accordingly, this Court held that physical presence is required in order to impose a use tax obligation on an out-of-state vendor. *Id.*

Despite the unequivocal *National Bellas Hess* requirement of physical presence, in the years following that decision, various states pursued an aggressive collection strategy, urging that the Court's decision was economically and legally outmoded. *See, e.g., North Dakota v. Quill Corp.*, 470 N.W. 2d 203 (N.D. 1991), *reversed*, 504 U.S. 298 (1992); *SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666 (Conn.), *cert. denied*, 501 U.S. 1223 (1991). In *Quill*, the North Dakota Supreme Court went so far as to decline to follow *Bellas Hess* because "the tremendous social, economic, commercial, and legal innovations" of the past quarter-century have rendered its holding "obsolet[e]," 470 N.W. 2d at 208. In addition to the growth of the mail order business since *Bellas Hess*, the North Dakota Supreme Court focused on the changes in the "legal landscape." *Id.* With respect to the Commerce Clause, it concluded that *Complete Auto Transit v. Brady*, 430 U.S. 274, indicated that the physical presence nexus of *Bellas Hess* was no longer required.

This Court granted certiorari in *Quill* and reaffirmed its holding that physical presence is required under the Commerce Clause in order for a state to impose a use tax collection obligation on an out-of-state vendor. North Dakota raised two arguments in *Quill*. First, it argued that economic nexus is sufficient to satisfy the Due Process and Commerce Clauses, and therefore that *Bellas Hess* should be overruled as outmoded and obsolete. Second, claiming that Quill in fact had some property present in the state in the form of computer software, North Dakota argued that the Commerce Clause requirement should be relaxed to make anything more than communication by "mail or common carrier" constitute the requisite "physical presence."

This Court rejected both arguments, and reaffirmed the "bright-line rule" of *Bellas Hess* for Commerce Clause purposes.

B. The Decision Below Directly Conflicts With This Court's Decisions Requiring Physical Presence

Under the "bright-line rule" of *National Bellas Hess*, which was reaffirmed in *Quill*, "physical presence" is a constitutional prerequisite to the imposition of a sales or use tax on an out-of-state vendor. *National Bellas Hess*, 386 U.S. at 758; *Quill*, 504 U.S. at 310-11. A vendor with no physical presence in the taxing state "lacks the 'substantial nexus' required by the Commerce Clause." *Quill*, 504 U.S. at 311.

The court below, while appearing to accept the first part of the Court's holding in *Quill* — that economic nexus cannot substitute for physical presence — effectively rejected the second part of the Court's holding in *Quill* — that the Commerce Clause requires a substantial physical presence in the taxing state. Although purporting to adhere to the notion that the physical presence must be more than the "slightest presence" (App. 12a), the New York Court characterized this Court's retention of the physical presence requirement as "somewhat begrudging," App. 10a, and acted almost as if *Quill* had never been decided. Thus, under the decision below, virtually any physical presence, even if minimal, sporadic and unrelated to the transactions the state seeks to tax, would be sufficient under the Commerce Clause. The decision below "tell[s] out-of-state businesses that they dare not dip their toes within New York's border without incurring New York taxes . . . ." App. 16a (Bellacosa, J., dissenting).

The decision of the New York Court of Appeals is thus in direct conflict with several decisions of this Court.

First, in determining that any physical presence beyond mail or common carrier in the state violates the "bright-line rule" of *Bellas Hess* and gives rise to use tax liability, the decision below directly conflicts with this Court's decision in *Quill*. As noted above, in *Quill*, the mail order vendor there had some physical presence in the State. In addition to Quill's common-carrier

contacts with the State, it also licensed software to some of its clients in the State, with Quill's computer diskettes therefore physically present in the State. The State in *Quill* argued that this presence satisfied the physical presence requirement. *See* Brief for Respondent State of North Dakota at 45-47, *Quill v. North Dakota*, 504 U.S. 298 (1992) (No. 91-194).

This Court rejected North Dakota's claim, stating that while the physical presence of the diskettes in the State "might constitute some minimal nexus," it was not sufficient to satisfy the "substantial nexus" requirement of the Commerce Clause. *Quill*, 504 U.S. at 315 n.8. This Court noted that it had previously "expressly rejected a 'slightest presence' standard of constitutional nexus." *Id.* (quoting *National Geographic Society v. California Bd. of Equalization*, 430 U.S. at 556). In this case, the court below, while purporting to adhere to this precedent, essentially rejected it in holding that the requisite nexus may be found even where the out-of-state vendor has only minimal and sporadic presence in the state. But, as the dissent recognized below, the nature and extent of VIP's activities in New York are "less 'substantial' than all previous cases where 'substantial nexus' has been found to exist." App. 23a.

Indeed, the court below utterly misconceived the "bright-line rule." It is not a bright line dividing mail and common carrier contacts with the State from all other contacts. Rather, it is a bright line that divides physical presence from a vendor's insubstantial in-state activities and its out-of-state activities. As this Court recognized in *Quill*, "whether or not a State may compel a vendor to collect a sales or use tax may turn on the presence in the taxing State of a small sales force, plant, or office." 504 U.S. at 315.

Thus, in *National Geographic Society v. California Board of Equalization*, 430 U.S. 551 (1977), this Court expressly rejected the claim that the "slightest presence" of a mail order vendor in the State was sufficient to satisfy the Commerce Clause. There, National Geographic maintained two full-time, fully-staffed offices in the State. Although the offices were wholly unrelated to

National Geographic's mail order sales, they were "a much more substantial presence than the expression 'slightest presence' connotes." 430 U.S. at 556.

Likewise, the decision below conflicts with *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954). There, the out-of-state seller was physically present in the taxing state through its occasional deliveries (using its own truck, rather than a common carrier) of the goods purchased out-of-state by residents of the state. Despite the vendor's undisputed presence in the state, the Court determined that, even under the more lenient Due Process Clause, the requisite nexus was lacking. But, under the standard applied by the court below, the out-of-state vendor in *Miller Bros.* would be subject to a use tax obligation, based solely on its sporadic presence in the taxing state.

Second, by equating the "substantial nexus" requirement of the Commerce Clause with the minimum contacts requirement applicable to the Due Process Clause, the decision below conflicts in a second way with *Quill*. According to the New York Court of Appeals, *National Bellas Hess* set forth a "minimum connection physical presence requirement," a standard that the New York court viewed as "begrudgingly" retained by this Court in *Quill*. App. 10a.

Significantly, in *Quill*, this Court made clear that the substantial nexus requirement of the Commerce Clause was wholly separate from and, significantly, far more stringent than the "minimum contacts" standard for the Due Process Clause. Specifically, the Court stated that "a corporation may have the 'minimum contacts' with a taxing State as required by the Due Process Clause, and yet lack the 'substantial nexus' with that State as required by the Commerce Clause." *Quill*, 304 U.S. at 313. By effectively equating the two standards, the New York Court of Appeals has eliminated the protection accorded interstate commerce under the Commerce Clause.

The decision below is all the more remarkable in this regard because VIP's physical presence in New York does not even satisfy the more lenient due process requirement. To the court

below, although the limited physical presence of VIP in New York was wholly unrelated to the taxable transactions at issue, that limited presence still constituted sufficient nexus. This holding is inconsistent with this Court's due process jurisprudence.

While the conduct of sporadic activities in a state directly related to the subject of the litigation may be sufficient to sustain jurisdiction, *see, e.g., Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414 (1984); *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 447-48 (1952), where the activity is unrelated, far more is required. Thus "activities in the forum may not be so substantial as to support jurisdiction over a cause of action unrelated to those activities." *Keeton v. Hustler Magazine*, 465 U.S. 770, 779 (1984); *see Kulko v. Superior Court of California*, 436 U.S. 84, 92 (1978) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316-17, 319 (1945)) ("an essential criterion . . . is . . . the 'quality and nature' of the defendant's activity"). Personal jurisdiction based on unrelated activities may be found only if the defendant is carrying on in the forum "a continuous and systematic, but limited, part of its general business," and this presence must be substantial. *Keeton v. Hustler Magazine*, 465 U.S. at 779 (internal quotation omitted).

Given the necessity, for due process purposes, of a connection between a cause of action and in-state activities where the activities are insubstantial, the stricter Commerce Clause standard, *see Quill*, 112 S. Ct. at 1913, requires at least as much. Thus, in virtually all of this Court's cases where the requisite nexus was present, the out-of-state seller either had in-state stores with some relation to the mail order business or it had in-state solicitors. For example, where the out-of-state mail order seller maintained retail stores in the taxing state, *see, e.g., Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359; *Nelson v. Montgomery Ward & Co.*, 312 U.S. 373 (1941), or where the sales by the out-of-state company were arranged by local agents in the taxing state, *see Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U.S. 62; *General*

Trading Co. v. State Tax Comm'n, 322 U.S. 335 (1944), the requisite Commerce Clause "substantial nexus" was present.

Third, in another closely related area, this Court has recognized that in-state activities virtually identical to those involved here are not a sufficient predicate for taxation. In *Quill* itself, the Court acknowledged that Congress has "followed a similar approach in its regulation of state taxation" in enacting Pub.L. 86-272 (codified at 15 U.S.C. § 381). *Quill*, 504 U.S. at 316 n.9. As this Court explained, in enacting that statute, Congress prohibited states from imposing a net income tax on a person whose "only business activities within such State [involve] the solicitation of orders [approved] outside the State [and] filled . . . outside the State." *Id.* (quoting 15 U.S.C. § 381). In *Wisconsin Dep't of Revenue v. Wrigley Co.*, 112 S. Ct. 2447 (1992), the Court held that in-state "recruitment, training, and evaluation" of sales representatives and "use of hotels and homes for sales-related meetings" were not sufficient to give rise to tax liability under Pub.L. 86-272. *Id.* at 2449. In the mail order context, similar in-state activities and certainly the lesser, insubstantial levels of in-state activity present here, should not give rise to liability.

Certiorari should be granted to correct the Court of Appeals' begrudging and inaccurate interpretation of this Court's decision in *Quill* and in view of the conflicts between the decision below and other decisions of this Court.

II. THIS CASE PRESENTS AN IMPORTANT AND RECURRING ISSUE THAT SHOULD BE RESOLVED BY THIS COURT

Although *Quill* was intended, with its broad reaffirmation of *Bellas Hess*, to put the question of physical presence to rest once and for all, state efforts to impose sales and use taxes on

out-of-state mail order vendors have not abated.[5] As a result, the issue in this case — the substantiality of the physical presence necessary to satisfy the Commerce Clause — has continued to be pressed by commentators and before state administrative boards and state courts since this Court's decision in *Quill*.

Commentators have recognized that conflicting interpretations of *Quill* have led to continued litigation. *See, e.g.*, W. Carl Spining, *Forcing Mail-Order Houses To Collect Use Taxes in the Wake of Quill Corp. v. North Dakota*, 60 Tenn. L. Rev. 1021, 1035 (1993). Recently, the Multistate Tax Commission issued Proposed Nexus Guidelines for States, which would permit imposition of a sales and use tax even if the out-of-state vendor is not physically present in the state. *See* Multistate Tax Commission, *Nexus Guideline for Application of a Taxing State's Sales and Use Tax to a Remote Seller* (draft of Jan. 25, 1995). Under the proposed guidelines, a vendor can be "deemed physically present," for example, by maintaining a private contract telecommunications linkage in the state. *Id.* at 4-5.

While to date only a few cases have reached state appellate courts, a conflict has already resulted. In *Florida Dep't of Revenue v. Share International, Inc.*, the Florida Court of Appeals held that the physical presence in the state three days each year of the out-of-state seller's president and vice president, at a convention at which the seller's products were displayed and sold, did not satisfy the substantial nexus requirement of the Commerce Clause. The Florida court rejected the "argument that once an out-of-state vendor crosses the 'bright-line' established in *Bellas Hess* by doing anything more than communicate with its customers by mail or common carrier that it will be liable to the taxing state to collect its sales or use tax." No. 93-4093, 1995

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[5] Since this Court's decision in *Quill*, states have also applied other forms of taxes on out-of-state corporations lacking a physical presence in the state. *See, e.g., Geoffrey, Inc. v. South Carolina Tax Comm'n*, 437 S.E. 2d 13 (S.C.), *cert. denied*, 114 S.Ct. 550 (1993) (application of state income tax in absence of physical presence).

Fla. App. LEXIS 8839, *11 (Fl. Dist. Ct. App. Aug. 21, 1995). Thus, the Florida court, unlike the New York court, did not hold that *Quill* permits imposing a sales or use tax if the mail order vendor does anything more than have mail and common carrier presence in the state. Nor did the Florida court hold that limited, sporadic presence in the state — even where connected to the activity for which the tax was imposed — satisfied the "substantial nexus" requirement.

Resolution of this issue is important in light of the potential for massive retroactive tax liability on individual companies which have relied in good faith on this Court's decision in *Quill*. It would also serve the interests of states which require certainty as to the permissible scope of their taxing jurisdiction. Such certainty permits states to order their financial affairs.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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September 26, 1995